INDEX

	Page
INTRODUCTORY PRAYER	1
OPINION BELOW	2
SUMMARY AND STATEMENT OF MATTER INVOLVED	2
JURISDICTIONAL STATEMENT	3
STATUTE INVOLVED	3
QUESTION PRESENTED	3
REASONS RELIED ON FOR WRIT	3

CASES CITED

Affolder v. New York, Chicago and St. Louis Railroad Company, 339 U. S. 96, 94 L. Ed. 683, 70 S. Ct. 509	4
Carter v. Atlantic & St. Andrews Bay Railway Company, 338 U. S. 430, 94 L. Ed. 236, 70 S. Ct. 226	4
Chicago R. I. & P. R. Co. v. Brown, 229 U. S. 317, 57 L. Ed. 1204, 33 S. Ct. 840	4
O'Donnell v. Elgin J. & E. R. Co., 338 U. S. 384, 94 L. Ed. 187, 70 S. Ct. 200	4
San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 60 L. Ed. 1110, 36 S. Ct. 630	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.____

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,

Petitioner,

adv.

WILL J. McGOWAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition of The Denver and Rio Grande Western Railroad Company, a corporation, for a Writ of Certiorari to review the judgment of the Supreme Court of Utah entered in the above case on May 14, 1952, respectfully shows:

OPINION BELOW

The opinion of the Supreme Court of Utah (R. 80) (Tr. 0097) is reported in 224 P. 2d 628. It is not yet reported in the Utah Reports.

SUMMARY AND STATEMENT OF MATTER INVOLVED

The majority of the Supreme Court of the State of Utah affirmed a judgment of the District Court in favor of Respondent and against Petitioner upon the verdict of the jury in an action predicated upon an alleged violation of the provisions of the Safety Appliance Act, making it unlawful for a common carrier by railroad to permit to be used on its line any car not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars (45 U. S. C. A. Section 2).

In the afternoon of April 15, 1950, respondent, a brakeman employed by petitioner, was directing the coupling of a coal car attached to the rear of a moving engine to a box car standing on a side track in petitioner's yard at Cameo, Colorado. He testified that when the coal car reached a point about eight feet from the box car, he concluded that the drawbar on the coal car was out of alignment to the extent that the cars would not couple upon impact (Tr. 0020) (R. 14). He then placed his foot against the knuckle of the drawbar and pushed on it. He was unable to remove the drawbar, so he gave the engineer a signal to stop. He pushed twice more on the drawbar, the last time at the very moment of impact (Tr. 0038-9) (R. 29-30). The cars coupled upon impact with respondent's foot between the couplers (Tr. 0043) (R. 33). He alleged in his complaint that the drawbar on the coal car was "stiff and extra-ordinarily difficult to adjust" (Tr. 0021) (R. 2, 15). He was unable to estimate the distance, if any, the drawbar was moved before the coupling was made (Tr. 0038) (R. 30).

The drawbar on the coal car was mounted on a rocker mechanism which automatically aligned the drawbar with

not more than one inch lateral variation either way from dead center (Tr. 0076) (R. 62). There was no evidence that an inch of play in the drawbar would prevent the cars from coupling upon impact. The rocker mechanism was in good operating condition (Tr. 0076) (R. 62). The drawbar on the standing car was in alignment and the couplers on each of the cars were open (Tr. 0035) (R27-28). Each car had been uncoupled on a straight track just a few minutes before the accident occurred (Tr. 0035-6) (R27-28).

JURISDICTIONAL STATEMENT

A. The Jurisdiction of this Court is invoked under Title 28, U. S. C. A. Section 1257, paragraph 3.

B. The judgment of the Supreme Court of Utah was entered May 14, 1952 (Tr. 0096) (R. 80).

C. The petition for Rehearing was denied July 16, 1952 (Tr. 0104) (R. 101).

D. By order of Mr. Justice Clark the time to file this petition was extended to November 13, 1952.

E. This petition was filed November 13 , 1952.

F. The statute of the United States applied by the Supreme Court of Utah is Title 45, U. S. C. A. Section 2.

QUESTION PRESENTED

The question presented is whether compliance by a railroad with the provisions of Section 2 of the Safety Appliance Act is to be determined by the performance of the equipment on the occasion in question, or as the Supreme Court of Utah held—by an employee's opinion on the efficiency of the equipment.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Supreme Court of Utah has decided a Federal question of substance and importance in a way not in accord

with the applicable decisions of the Supreme Court of the United States, to wit:

> *Affolder* v. *New York, Chicago and St. Louis Railroad Company*, 339 U. S. 96, 94 L. Ed. 683, 70 S. Ct. 509; *Carter* v. *Atlantic & St. Andrews Bay Railway Company*, 338 U. S. 430, 94 L. Ed. 236, 70 S. Ct. 226; *O'Donnell* v. *Elgin J. & E. R. Co.*, 338 U. S. 384, 94 L. Ed. 187, 70 S. Ct. 200; *San Antonio & A. P. R. Co.* v. *Wagner*, 241 U. S. 476, 60 L. Ed. 1110, 36 S. Ct. 630; *Chicago R. I. & P. R. Co.* v. *Brown*, 229 U. S. 317, 57 L. Ed. 1204, 33 S. Ct. 840.

It has decided contrary to the unambiguous provisions of Section 2 of the Safety Appliance Act that the test of compliance by a railroad with the specifications of the Act is not the functional efficiency of the equipment, but the opinion of an employee with respect to such efficiency.

It is essential that the writ be granted in order to have determined important questions relating to the construction and application of the Safety Appliance Act, and specifically whether the phrase "without the necessity of going between cars" used in Section 2 of the Act is to be construed as a specification of the type of equipment to be furnished by railroads engaged in interstate commerce, or as a specification of conduct of railroad employees.

PRAYER

WHEREFORE, petitioner prays that the writ be granted.

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY,
Petitioner,

DENNIS McCARTHY,
GRANT H. BAGLEY,
Counsel for Petitioner.
1311 Walker Bank Building
Salt Lake City, Utah

INDEX

SUBJECT INDEX

	Page
OPINION BELOW	1
THE QUESTION PRESENTED	1
STATUTE INVOLVED	2
STATEMENT	2

TABLE OF CASES CITED

Affolder v. New York, Chicago and St. Louis Railroad Co., 339 U. S. 96, 94 L. Ed. 683, 70 S. Ct. 509	4, 5
The Atchison, Topeka & Santa Fe Railway Company v. White (Case No. 615, Oct. Term, 1951, filed February 27, 1952, and denied April 21, 1952), 244 S. W. 2d 26	2
Atlantic City R. Co. v. Parker, 242 U. S. 56, 37 S. Ct. 69, 61 L. Ed. 150	6
Carter v. Atlanta & St. Andrews Bay Ry. Co., 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236	5
Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 33 S. Ct. 840, 57 L. Ed. 1204	6
Chicago, St. P. M. O. Ry. Co. v. Muldowney, 130 F. 2d. 971 (Cert. den. 317 U. S. 700, 63 S. Ct. 526, 87 L. Ed. 560)	6
Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 31 S. Ct. 617, 55 L. Ed. 590	6
Donnelly v. Penn. R. Co., 342 Ill. App. 556, 97 N. E. 2d 846	6
Geraghty v. Lehigh Valley R. Co., 70 F. 2d 300	6
Hampton v. Des Moines & Cent. I. R. Co., 65 F. 2d 899	6
Johnson v. Southern Pacific Co., 196 U. S. 1, 25 S. Ct. 158	4
O'Donnell v. Elgin, J. & E. Ry. Co., 338 U. S. 384, 70 S. Ct. 200, 94 L. Ed. 187	5
San Antonio and Arkansas Pass Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626, 60 L. Ed. 1110	4, 5
White v. Atchison, Topeka & S. F. Ry. Co. (Mo.), 244 S. W. 2d 26, (Cert. den. 72 S. Ct. 648)	6

STATUTE

45 U. S. C. A., Section 2	2

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 450

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,

Petitioner,

vs.

WILL J. McGOWAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below.

The opinion of the Supreme Court of Utah in this case appears at Record 80. It has not yet been published officially, but is reported in 224 P. 2d 628.

The Question Presented.

The question presented here and passed upon by the Supreme Court of the State of Utah is as follows:

Where the drawbar is out of alignment so that railroad cars will not couple automatically upon impact, requiring the employee to take a position between the ends of the cars to adjust and align the drawbar by hand or foot, has the coupler provisions of the Safety Appliance Act been violated?

Statute Involved.

The statute involved is 45 U.S.C.A., Section 2, which reads as follows:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Statement.

The petitioner's statement of the matter involved does not accurately or fairly reflect the testimony in this case. Also, this exact matter was presented to this Court in the case of *The Atchison, Topeka & Santa Fe Railway Company v. White* in which the petition for a writ of certiorari was denied (See Case No. 615, Oct. Term, 1951, filed February 27, 1952, and denied April 21, 1952, 244 S.W. 2d 26).

Respondent here, after a full trial before a jury, received a verdict (R. 5) and judgment was rendered in his favor (R. 5). This verdict was cut by remittitur (R. 8) and on appeal to the Utah Supreme Court respondent's judgment was affirmed (R. 80).

Respondent was a brakeman for the defendant company and on April 15, 1950, at 4:45 in the afternoon he was injured at Cameo, Colorado. Immediately prior to his injury he was standing north of an east-west passing track where he was to oversee a coupling movement between a standing cut of cars and a loaded coal car being shoved by a backing engine in an easterly direction along said track (R. 13, 23). Respondent was approximately 8 feet west of the standing

cut (R. 13, 23). As the moving car was about opposite him, he observed that its drawbar was out of line to the north and in such position it would not couple upon impact (R. 14, 25, 30, 33, 34).

The testimony conclusively established that there was no device or appliance on the drawbar or car by or with which an adjustment of the drawbar could be made outside of the ends of the car. The adjustment could only be accomplished by an employee going between the ends of the cars to make the adjustment (R. 15, 65, 66, 77, 78).

Respondent placed his foot on the drawbar and shoved it three times. On each occasion he moved it a little, and upon the final shove it moved over sufficiently far so that it coupled (R. 30, 32, 33, 34), but plaintiff's right foot was caught in the coupling mechanism and he lost his toe (R. 15, 31, 34). Testimony was offered by the defendant to show that the drawbar on the coal car was mounted on a rocker mechanism, the purpose of which was to automatically align the drawbar. It was conceded, however, by petitioner's witness that this means of centering the drawbar was not at all times perfect and that there were variations in the position in which a drawbar would remain due to wear or the amount of rust or dirt that might collect in the working parts (R. 65, 68). It was conclusively established that there was no device with which to adjust the drawbar from a position outside the ends of the car.

The evidence in this case conclusively establishes that the drawbar was out of line so that it would not couple, and the only means at hand to make the adjustment was for respondent to place a part of his body between the ends of the cars to make the adjustment. He did make the adjustment with his foot between the ends of the car, thereby receiving his injuries. This clearly constitutes a

case coming within the Safety Appliance Act relating to couplers.

A multitude of authorities might be cited to establish the purpose of this enactment, which the courts have decided is remedial and humanitarian and which should be given a liberal construction in favor of the injured employee. The paramount purpose of Congress, as held by the courts, was to make it unnecessary for men to be or to go between the ends of cars for the purpose of coupling or uncoupling. It was this specific hazard against which the employee was to be afforded protection. This section applies the test of whether the person operating the coupler is required to go between the ends of the cars to accomplish the act of coupling as well as that of uncoupling, and the concluding phrase of the statute is applicable to both. *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 25 S.Ct. 158, *San Antonio and Arkansas Pass Co. v. Wagner*, 241 U.S. 476, 36 S.Ct. 626, 60 L.Ed. 1110.

The petitioner in presenting reasons for the allowance of the writ merely cites five cases from the Supreme Court of the United States under the general statement that they are applicable to the case as bar and that the decision of the Utah Supreme Court is contrary to them. We are at a loss to understand this statement or the reasoning by which petitioner arrives at this conclusion. In a consideration of these cases a distinction must be made between the knuckles of a coupler and the drawbar itself. The knuckles on the couplers of both cars involved here were open and hence were in a proper position to accomplish a coupling (R. 17, 18, 25, 28, 34, 35).

In the case of *Affolder v. New York, Chicago and St. Louis Railroad Co.*, 339 U.S. 96, 94 L.Ed. 683, 70 S. Ct. 509, it was held that the knuckle on at least one of the couplers

had to be open so that they would have an opportunity of coupling. However, the court was referring to the position of these knuckles, whether open or closed, and the knuckles may be opened by use of a cutting lever or pin lifter which can be operated from a position outside of the ends of the cars (R. 24, 34).

Here it was the drawbar that needed to be placed in alignment and, concededly, there was no device or apparatus by which this alignment could be accomplished and hence, in order to make the alignment, it was necessary that repondent place himself between the ends of the cars.

Neither the *Affolder* case, supra, nor *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 70 S.Ct. 226, 94 L.Ed. 236, nor *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 70 S.Ct. 200, 94 L.Ed. 187, cited by petitioner, involved drawbars which were out of alignment.

Another case cited by petitioner, *San Antonio and Arkansas Pass R. Co. v. Wagner*, 241 U.S. 476, 36 S.Ct. 626, 60 L.Ed. 1110, supports the holding of the Utah Supreme Court. There plaintiff was on the footboard of an engine which was backing into a coupling with a car. He saw the drawbar was out of line. He placed his foot on the drawhead to shift it over so it would couple. His foot was caught between the drawheads and he was injured. Defendant's contentions there were the same as petitioner's here and this Court ruled for plaintiff that there was a violation of the Safety Appliance Act.

The courts have uniformly held that where drawbars are out of line and the couplers will not couple automatically on impact without further adjustment and it is necessary to make the adjustment for an employee to go between the cars, there then is a violation of the Safety Appliance

Act. *Atlantic City R. Co. v. Parker*, 242 U.S. 56, 37 S.Ct. 69, 61 L.Ed. 150; *Delk v. St. Louis & S.F. R.Co.*, 220 U.S. 580, 31 S.Ct. 617, 55 L.Ed. 590; *Chicago, St. P. M.O. Ry. Co. v. Muldowney*, 130 F. 2d 971 (cert. den. 317 U.S. 700, 63 S.Ct. 526, 87 L.Ed. 560); *Hampton v. Des Moines & Cent. I.R. Co.*, 65 F. 2d. 899; *Geraghty v. Lehigh Valley R. Co.*, 70 F. 2d 300, *White v. Atchison, Topeka & S. F. Ry. Co. (Mo.)*, 244 S.W. 2d 26, (cert. den. 72 S.Ct. 648); *Donnelly v. Penn. R. Co.*, 342 Ill. App. 556, 97 N.E. 2d 846.

The remaining case cited by petitioner, *Chicago, R. I. & P.R. Co. v. Brown*, 229 U. S. 317, 33 S.Ct. 840, 57 L.Ed. 1204, involved a situation where plaintiff employee sought to open the knuckles by use of the cutting lever from outside the ends of the cars. The lever would not work and he reached in to make the adjustment with his hands, fell and his leg was cut off. This Court held for plaintiff that there was a violation of the Safety Appliance Act.

We call attention to the fact that the petition does not in any way contend that erroneous instructions were given, and this matter was submitted to the jury upon the proposition that they must find that the drawbars were out of alignment so that they would not have coupled without adjustment and that they must further find that to make the adjustment it was necessary to have an employee place some part of his body between the ends of the cars.

A reading of the opinion of the Utah Supreme Court establishes that it did not make compliance with the Safety Appliance Act depend upon an opinion of an employee. It was necessary for the jury to find under the instructions

and it could find that the drawbar was out of alignment sufficiently to prevent an automatic coupling.

No important or special reasons have been given for the issuance of the writ in this case and it is respectfully submitted that the petition should be denied.

Respectfully submitted,

Of Counsel:

Harold E. Wallace
Brigham E. Roberts
Wayne L. Black
530 Judge Building
Salt Lake City, Utah

CALVIN W. RAWLINGS
Counsel for Respondent
530 Judge Building